United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1069

To be argued by
MICHAEL D. ABZUG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-1069, 76-1077

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN DININO and VINCENT DEVITO,
Defendants-Appellants.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN DININO AND VINCENT DEVITO,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John Dinino and Vincent DeVito appeal from judgments of conviction entered on January 20, 1976, in the United States District Court for the Southern District of New York after a four-day trial before the Honorable Thomas P. Griesa, United States District Judge, and a jury.

Indictment 75 Cr. 265, filed March 14, 1975 in seven counts, charged John Dinino and Vincent DeVito in Counts Two through Seven with collecting and attempting to collect extensions of credit from specified individuals by extortionate means, in violation of Title 18, United States Code, Section 894, and in Count One with conspiring to do so in violation of that same statute.

Trial began on December 1, 1975 and concluded on December 5, 1975 when the jury found Dinino and

DeVito guilty on Counts One, Two, Four, Five and Seven, and not guilty on Count Six.*

On January 20, 1976, Judge Griesa sentenced both Dinino and DeVito to concurrent terms of one year's imprisonment on each of Counts One, Two, Four and Five, and to a term of two year's probation on Count Seven to commence upon expiration of the period of confinement.

Dinino and DeVito are at liberty on bail pending this appeal.

Statement of Facts

A. Government's Case

Through the testimony of seven drivers for two private rental car services located in the Bronx, the Government established that during the period from 1969 through 1973 defendants Dinino and DeVito participated in an unlawful scheme to lend money at usurious rates of interest to these "gypsy" cab drivers and to collect the principal and interest due by expressly and implicitly threatening to injure them.

1. Philip Jackson (Counts One and Four)

In the early part of 1970, while employed as a driver for Al's Private Car Service in the Bronx (Tr. 18),** Philip Jackson noticed that John Dinino, although not employed by Al's, appeared at the cabstand every Mon-

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* At the close of all the evidence the trial court granted defendants' motion for a judgment of acquittal on Count Three.

** "Tr." refers to pages of the trial transcript. "Br. VD" and "Br. JD" refer, respectively, to the briefs of appellants DeVito and Dinino.

day, Wednesday, and Friday, and that on those occasions Dinino collected money from various cab drivers, including Sherman Ronson and Sidney Shalkin (Tr. 20). After working nine or ten months at the car service, Jackson met Dinino and asked him for a $500 loan (Tr. 24). Dinino responded that since Jackson was a new customer "the office" would lend him only $200 and further stated that Jackson could repay the loan in one of two ways. Jackson could obtain a "vig loan" which would require him to pay $5 of interest every week for every $100 borrowed until the principal was repaid. Alternatively, he could obtain a "6 for 5" loan which would obligate him in exchange for a $100 loan, to pay $20 every week for six weeks. Dinino explained that if Jackson missed a $20 payment on the second type of loan he would have to give Dinino a $6 interest payment until the next weekly payment became due (Tr. 25-26). Following Dinino's explanation, Jackson requested a "6 for 5" loan and Dinino said that he would have to seek approval for the same (Tr. 27).

The following week Dinino gave Jackson a $200 "vig" loan (Tr. 27-28). Fc[illegible]wo to three months thereafter Jackson paid Dinino $10 every Friday at Al's Private Car Service, and then asked Dinino for an additional $300 loan. Dinino said that he would tell Jackson if his request had been approved the next time he saw him. The following week Jackson received an additional $300 from Dinino, thereby increasing his weekly payments to $25 (Tr. 29).

In late spring 1971, Jackson asked Dinino for an additional $500 "6 for 5" loan, pointing out that he had always been prompt in his payments and that by working seven days a week he could meet the increased payment schedule. Dinino replied that the most he could get him was $200 (Tr. 30-31). Following his receipt of this $200 "6 for 5" loan, Jackson renegotiated or "pyramided" his loans with Dinino approximately 12 times over the next year (Tr. 33-34).

From the spring through the fall of 1971, Jackson made payments of between $65 and $145 on these loans every Friday at Al's Private Car Service (Tr. 32-34). During this six month period, Dinino introduced defendant Vincent DeVito to Jackson and explained that DeVito was his "partner" and that either he or DeVito would make collections at the car service. Thereafter, DeVito and Dinino took turns collecting from Jackson (Tr. 37).

On several occasions during that period Jackson overheard Dinino tell drivers who had failed to make one of the required weekly payments "that they had better have the money next time." If any such driver was again unable to pay Dinino when he reappeared, Dinino threatened "I'll be back next week, I don't want to hear anymore bullshit, . . . I don't want to hear anymore stories" (Tr. 38).

In the fall of 1971, after Dinino refused to lend Jackson additional money because he had borrowed his "limit", Jackson asked Ronald Levine, another cab driver, to borrow $500 from Dinino and give Jackson the money without Dinino's knowledge. After Levine complied and Jackson received an additional $500 from Dinino, Jackson made weekly payments to Dinino and DeVito of $85 on his loans and gave $25 to Levine to be repaid to Dinino or DeVito in connection with the "Levine" loan (Tr. 44-46, 250-251).

At approximately the same time he surreptitiously procured the "Levine" loan, Jackson also began placing wagers with a "bookmaker" by calling a telephone number that Dinino had given him (Tr. 40-41). Thereafter, in addition to collecting from Jackson every Friday on the usurious loans, Dinino collected Jackson's gambling losses every Tuesday (Tr. 43).

In early 1972, Jackson lost $800 wagering over the telephone number Dinino had given him (Tr. 46). After waiting two weeks for the unpaid money, Dinino told Jackson that it wasn't . . . his money and he was working for an office and he wasn't responsible and he didn't want to hear any more stories and he wanted his money and expected [Jackson] to have it on Friday when he returned for his normal payments from [Jackson] on [his] other loans" (Tr. 49).

A week later, Jackson told Dinino that he could not meet his loan payments and pay the gambling debt. When he proposed consolidating the payments to $25 a week, Dinino abruptly rejected the proposal and said that "he had better come up with a better figure" (Tr. 54). The following week, Jackson reiterated that he could not meet the loan payments and pay his gambling debt. He also told Dinino that the $500 "Levine" loan was actually given to him and that any settlement would have to include the "Levine" loan—a proposal Dinino angrily rejected. When Jackson began to argue, Dinino threatened "for two cents I'll bust your balls right here" (Tr. 59).*

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* Levine, who was present at and overheard the argument, confirmed the fact of Dinino's angry threat to Jackson (Tr. 253). While at trial Levine acknowledged only that the argument made him "uneasy" (Tr. 279), he admitted testifying in the grand jury—the pertinent portion of which was adduced by the Government without objection—that Dinino had been "loud" and "nasty" and that in consequence of Dinino's threat to Jackson he, Levine, had become frightened (Tr. 280-281). Furthermore, although at trial Levine testified that during the argument Jackson, too, was angry, shouting and upset (Tr. 281-282), Levine admitted testifying in the grand jury—the pertinent portion of which was also adduced by the Government without objection—that Jackson was both "angry and scared" (Tr. 282-283).

Following this conversation, Jackson paid $100 a week to either Dinino or DeVito for three months. He agreed to pay them this sum, which was four times his originally proposed sum of $25 a week because of Dinino's threat to "bust his balls" and because "I had owed him money through the bookmaking operation, and he explained to me tnat they were two different offices, I was doubly frightened because I was afraid that either one of his offices that he worked out of might come down and threaten me or do any damage, bodily damage to me" (Tr. 61).

In mid-1972, a third person began making collections from Jackson and the other drivers. DeVito introduced this individual as "Louis" and instructed the drivers to pay Louis for the next three to four weeks just as they had paid him and Dinino (Tr. 64). About ten days later, Louis appeared at Al's Private Car Service earlier than normal. When Jackson asked him the reason for his early appearance, Louis replied that he had been trying to collect from Sid Shalkin for a week and that "he was making it his business that he would get [Shalkin] in today" (Tr. 66). When Jackson asked why Louis was implying that something would happen to Shalkin if he failed to pay, Louis pulled a revolver out of his pants, put it to Jackson's chest and said "for two cents I'll blow your fucking brains out" (Tr. 67). Jackson testified he was very frightened and that he continued making payments to Dinino and DeVito until the late summer of 1973 (Tr. 67).

2. Ronald Levine (Counts One and Two)

In late 1970 or early 1971, while employed as a driver at Al's Private Car Service, Ronald Levine met defendants Dinino and DeVito and asked them for a $500 loan. Unknown to Dinino and DeVito, this loan was for Phil Jackson (Tr. 250). Dinino explained that in return for

the loan, Levine would have to pay them $25 a week interest until the principal was repaid (Tr. 249). Following this loan, Levine began making weekly payments of $25 to DeVito or Dinino with Jackson's money (Tr. 250-251). In February or March 1971, as described above, Jackson informed Dinino that he had been the actual recipient of the proceeds of the "Levine" loan and that he was unable to make the required weekly payments on his various loans and debts. Dinino's threats, as described above, followed.

Following Dinino's threats to Jackson, Levine borrowed $300 from DeVito at usurious interest rates. Levine made payments of interest and principal to DeVito every Friday afternoon until 1972 when DeVito told him that Dinino would take over the collections (Tr. 261-262). Dinino made the collections from Levine for the remainder of 1972 (Tr. 263-266).

In addition to payments on debts because of loans, Levine incurred additional indebtedness to Dinino because of gambling losses. In the latter part of 1972, Dinino gave Levine a telephone number and a code name, "American for Lucky," to use to place wagers (Tr. 284). Levine testified that Dinino paid his winning wagers or collected his losing wagers every Monday at Carter Cab. Levine testified that on one occasion he was unable to pay Dinino $500 that he had lost wagering. In response, according to Levine's trial testimony, Dinino said only that "he didn't want to hear [any excuses]. He had to have [the money] that week. He was responsible for the money, so he had to have it" (Tr. 288).

In contrast, however, to his trial testimony of those events, Levine's testimony in the grand jury, which the Government adduced without objection, evidenced that Dinino had threatened Levine with physical harm when

told by the latter that he was unable to repay his gambling debt.*

At trial, Levine testified that he had never been afraid of Dinino and that after his conversation with Dinino wherein he told him that he could not repay his gambling debts, he, Levine, had felt only "uneasy" (Tr. 290). Levine's grand jury testimony, however again adduced by the Government without objection, clearly evidenced that his conversation with Dinino had placed him in fear and that, indeed, he had paid Dinino the money the latter demanded out of fear that if he did not he would "[g]et beat up, have a broken leg, or something" (Tr. 291).

At trial Levine testified, consistently with the tenor of his grand jury testimony, that following this conversation with Dinino, he borrowed $500 from another shylock "right away" and gave it to Dinino (Tr. 291-292).

Following his last loan from Dinino in November of 1972, Levine owed a total of $1,300. He thereafter made weekly payments to Dinino or DeVito of between $25 and $65 until the FBI began an investigation in late 1973 (Tr. 292-294).

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* The pertinent portion of Levine's grand jury testimony was as follows:

> Q. At any time during the past five years were you threatened by Mr. Dinino or any of those individuals acting on his behalf? A. I was threatened one time. I used to gamble with him and one time when I gambled and I lost heavily, I didn't have the money to pay, and John said he was going to send around a few guys to straighten me out (see Tr. 290).

3. Sidney Shalkin (Counts One and Five)

From 1970 to 1974 Sidney Shalkin worked as a driver at Al's Private Car Service, earning, in 1971, about $100 a week (Tr. 120, 127).

After working at the car service for about a year and one-half, Shalkin borrowed $200 from Dinino. Although he was supposed to repay the loan by making 12 consecutive $25 payments, Shalkin made only six or seven before he became too sick to work and to continue the usurious payments (Tr. 122). When he returned to work after two months' absence, he explained the "circumstances" to Dinino. Dinino, however, threatened to punch Shalkin in the nos fter which Shalkin resumed his $25 repayments of the usurious loan that he had received from Dinino (Tr. 124-132). Shalkin renegotiated his original $200 loan several times and continued making weekly payments at usurious interest rates to either Dinino or DeVito until 1973 or 1974 (Tr. 128).

4. Charles Penker (Counts One and Six)

Penker worked as a driver for Carter Cab from May of 1970 through 1973, during which time he received four usurious loans from Dinino in amounts ranging from $200 to $500. In consequence, until December of 1972 Penker made weekly payments of principal and interest every Friday between 5:00 and 7:00 p.m. at Carter Cab to John Dinino or to Vincent DeVito, whom Dinino had instructed Penker to pay in his absence (Tr. 158).

In the fall of 1971, Penker overheard an argument between DeVito and another cab driver, Philip Cassese, in which Cassese accused DeVito of cheating him. DeVito

denied the accusation and slapped Cassese so hard his glasses flew from his face (Tr. 162).

In December 1972, Penker told Dinino he could not continue to meet his payments of interest and principal. Dinino told him that he would still have to give him a $10 interest payment every week (Tr. 176).

In January 1973, Dinino told Penker his balance was $300. When Penker contradicted Dinino by claiming it was only $100, Dinino said "I want all my money in. I'm getting out. Don't get me pissed off" (Tr. 177). From that moment on Penker regarded Dinino as a "changed man" and immediately borrowed $200 at usurious rates from another loanshark to get "Johnny [Dinino] off my back" (Tr. 176-177).

5. Philip Cassese (Counts One and Seven)

Philip Cassese, a driver employed by Carter Cab Company from 1970 to 1973, borrowed from Dinino during that period close to $500, as to which he "may have agreed to pay an extra few points of interest" (Tr. 217, 314).* Cassese made a total of some ten payments to Dinino and DeVito to repay the loan re-

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* Although Cassese's trial testimony regarding whether he had paid interest to Dinino was somewhat equivocal, his grand jury testimony, read into evidence by the prosecutor without objection, was not:

> Q. Well, I am not talking about if you missed the payments, I am asking you now whether as the condition of these loans you had to make weekly payments back to Mr. Dinino. A. Yes.
>
> Q. And if you missed one of these payments, you had to pay an additional sum of money, did you not? A. Yes, I would have to pay what's known as a penalty.
>
> Q. Vig or—— A. Or, as you would say, vig, yes, to which I also agreed (Tr. 317).

ceived from Dinino (Tr. 311, 323-24). He sometimes paid "Vinny" DeVito when Dinino wasn't around because "John probably spoke to me and said that a friend of his was coming around" (Tr. 325).

Cassese testified on direct examination that he "couldn't possibly remember" a conversation that he had had in the early summer of 1972 with DeVito about a payment that Cassese owed to Dinino (Tr. 326). When shown a copy of his March 7, 1975 grand jury testimony to refresh his recollection about that conversation, he remarked that "it seems that I was slapped in the face by Mr. DeVito [because] I think . . . I was very offensive towards him personally" (Tr. 327). Cassese further testified at trial that in the course of this conversation he told DeVito that he had paid Dinino in full, and that when DeVito disagreed, he, Cassese, "lost [his] temper and sort of moved towards [DeVito] and [DeVito] slapped [him] in the face and sent [him] back" (Tr. 328).

However, Cassese's grand jury testimony of this event, admitted without objection, evidenced in contrast that no threatening movement by Cassese had preceded DeVito's slap and that in fact DeVito had slapped Cassese immediately after the latter had said he was not going to pay any more money to either Dinino or DeVito. Not surprisingly, after the slap Cassese immediately paid DeVito the amount of money allegedly owed Dinino (Tr. 329-330).*

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* Cassese's grand jury testimony provided in part (Tr. 330):

Q. Did you give Vinny the amount of money that you owed John at that time? A. I did.

Q. And this was in response to the slapping? A. Well, I like to say, it was a misunderstanding. I felt that I had made that payment to John.

Q. Right. A. And Vinny disagreed with me.

[Footnote continued on following page]

6. Sherman Ronson (Counts One and Three)

Shortly after Sherman Ronson began working at Carter Cab in early 1969, Ronson was told by one of the drivers that Dinino loaned money and was a shylock (Tr. 384). Since Ronson needed money to support his gambling, he soon began borrowing money from Dinino at usurious interest rates (Tr. 385).

From January of 1969, when he received his first loan from Dinino in front of Carter Cab, until the end of 1971, when he quit working as a cab driver, Ronson renegotiated usurious loans with Dinino approximately eight to ten times. These usurious loans varied in amounts from $200 to $300.

From April of 1969 to April of 1970, Ronson paid Dinino $40 to $50 a week on Friday nights in front of Carter Cab (Tr. 393). Ronson testified that when he missed a payment, Dinino would telephone his wfe (Tr. 394). When his wife inquired about these calls, Ronson told her they pertained to business because he did not want her to know he was borrowing money (Tr. 395). A few days later, Ronson told Dinino that he would make his payments on time and asked him not to call his house again because he did not want his wife to know he was in debt (Tr. 396). Following this conversation, Ronson missed another payment. Notwithstanding Ronson's earlier request, Dinino called his house and, again spoke to his wife. When Ronson returned home his wife asked "What does he want, who is he, do you owe him any money?" (Tr. 397). When Ronson saw Dinino

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Q. And he slapped you? A. So I—so I without thought said I ain't going to pay.

Q. And Mr. DeVito known to you as Vinny slapped you in the face? A. That might have been the reason why.

again he pleaded with him not to call his wife again and promised to do his best to make his payments on time. Dinino responded, "If you make your payments on time, you won't have me—I won't make any calls to your house" (Tr. 398). Thereafter, until the spring of 1971, Ronson made weekly payments to Dinino of between $10 and $50 (Tr. 399). When Ronson could not make a payment, Dinino told him, "You are going to have to either make a payment or make the vig, one or the other, and cut out the crap" (Tr. 400).

In April of 1971, Vincent DeVito appeared at Carter Cab and told Ronson that "John won't be here for a while, I will be taking over for him" (Tr. 401). Thereafter, until he left Carter Cab at the end of 1971, Ronson made weekly payments to DeVito. After he left Carter, Ronson continued making these weekly payments, although he usually gave them to Dinino (Tr. 406).

7. Samuel Hershkowitz (Count One)

Samuel Hershkowitz began borrowing money at usurious rates of interest from Dinino in 1965. In 1969, he borrowed $500 from Dinino while he worked at Al's Private Car Service (Tr. 226-227). Following this loan and a subsequent renegotiation which brought the principal up to $600, Hershkowitz made weekly payments of principal and $10 "penalties" to Dinino unitl July of 1970, when he became too sick to work and continue payments (Tr. 230). After three months' illness, Hershkowitz returned to Carter Cab to visit some friends. While he was there Dinino entered the office and, knowing that Hershkowitz was ill at the time (Tr. 243), grabbed him by the arm and angrily said "Where's the money you owe me?" When Hershkowitz complained "Haven't I paid you enough?", Dinino replied "No, you still owe me money, and you have to pay me." After

Hershkowitz pleaded that "I can't do anything right now because I'm sick and I have to wait until I go back to work," Dinino agreed to wait (Tr. 231). Hershkowitz testified that it took Dinino 10 to 15 minutes to calm down after he had grabbed him and that Dinino's conduct at that time had frightened him (Tr. 234).

Following this incident, Hershkowitz went back to work and paid Dinino every week or, at Dinino's instruction, Vincent DeVito, when Dinino was not in front of Carter's Cab to receive payment (Tr. 232). Hershkowitz testified on cross that he was still fearful of Dinino because he, Hershkowitz, was "not as strong" as he use to be (Tr. 236).

B. The Defense Case

Neither defendant testified in his own behalf.

DeVito called two character witnesses, Arthur Attansio and Philip Tripi, both of whom testified that in their opinion DeVito was "law-abiding and peaceful" (Tr. 436, 440).

ARGUMENT

POINT I

There was sufficient evidence for the jury to conclude that Dinino and DeVito collected extensions of credit by extortionate means and conspired to do so.

A. The evidence of Dinino's guilt of the substantive offenses was more than sufficient.

Dinino claims his conviction should be reversed because his "conduct did not meet the objective standard of *United States v. Natale*, [526 F.2d 1160 (2d Cir. 1975), *cert. den.* — U.S. —, 44 U.S.L.W. 3608 (April 26, 1976)]" (Br. JD at 30). Instead, he argues, his conviction on Count Two was impermissibly based solely upon the victim's grand jury testimony, and that the guilty verdicts on the other counts were based on evidence of the victims' "subjective" misinterpretation of his "innocuous conduct," and a substitution by the jury of "disbelief in the witnesses' testimony" for affirmative proof (Br. JD at 29). Dinino's argument, however, relies upon factual contentions unsupported by record, ignores "the objective standard of *United States* v. *Natale*," and is wholly without merit.

In *Natale* this Court held that the Government was not required to prove that the debtors threatened were actually placed in fear in order to sustain a conviction under Title 18, United States Code, Section 894. Rather, this Court construed the term "threat" in the statute to make the defendant's conduct the gravamen of the offense:

> Acts or statements constitute a threat under 18 U.S.C. § 891(7) "if they instill fear in the person to whom they are directed *or are reasonably*

> *calculated to do so in light of the surrounding circumstances. . . .*" *United States* v. *Curcio*, 310 F. Supp. 351, 357 (D. Conn. 1970) (Timbers, *J.*) (emphasis added). It is this "calculated" use of threatening gestures or words to collect credit extensions which Congress has made criminal. Actual fear need not be generated, so long as the defendants intended to take actions which reasonably would induce fear in an ordinary person. In other words, it is the conduct of the defendant, not the victim's individual state of mind, to which the thrust of the statute is directed. We have no doubt that Congress meant to protect not only the weak and timid from extortionate threats, but the strong and intrepid as well. 526 F.2d at 1168 (footnote omitted).

Applying the above standards to Dinino, and viewing the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), there was no more than ample evidence to sustain his convictions under Counts 2, 4, 5 and 7.

In the course of collecting payments on the usurious loans he had extended to Philip Jackson (Count Four), Sidney Shalkin (Count Five), Ronald Levine (Count Two) and Samuel Hershowitz, Dinino used words and gestures which the jury could permissibly have found were intended and reasonably calculated to induce fear in an ordinary person.*

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* Dinino's conviction on Count Seven was premised on the testimony of Philip Cassese, which revealed that it was Vincent DeVito, Dinino's partner, who had there employed the extortionate means of collection.

Thus when Jackson refused to repay the balance remaining on his usurious loans and gambling debts unless those payments were also credited as well to the loan surreptitiously obtained through Levine, Dinino angrily rejected his suggestion and threatened to "bust his balls" unless he paid without further argument.* Moreover, Jackson's professed fear that someone might harm him if he failed to repay Dinino because of Dinino's repeated references to his offices cannot be dismissed as an unreasonable "subjective" interpretation of Dinino's remarks. Jackson was obtaining loans from the "offices" of Dinino and DeVito at unlawfully high rates of interest and continually repaying them over an extended period of time. The jury was entitled to consider Dinino's intent in repeatedly referring to his "offices" in the context of his threat to Levine that if he did not repay a gambling debt "he was going to send around a few guys to straighten [Levine] out" (Tr. 240). *See United States* v. *Nakaladski*, 481 F.2d 289, 299 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973). Finally, the jury was entitled to consider the fact that Dinino's co-conspirator, DeVito, introduced a man, Louis, to collect Jackson's loans who threatened to "blow [Jackson's] brains out" with a revolver when he questioned his debt collection tactics with Sidney Shalkin (Tr. 67). See *United States* v. *Frazier*, 479 F.2d 983, 986 (2d Cir. 1973); *United States* v. *Quintana*, 457 F.2d 874, 877 (2d Cir.), *cert. denied*, 409 U.S. 877 (1972).

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* Dinino argues that this language could not properly be characterized as a threat and that, in fact, it was merely a "vulgarism" and "colloquial expression" that Jackson himself had both heard and used before. Dinino's argument ignores the fact that the jury resolved precisely this question against him in accordance with wholly correct instructions (see Point III, *infra*). Moreover, Jackson testified that he paid Dinino because of this threat (Tr. 61), and Levine's grand jury testimony made clear that Jackson looked "scared" during his argument with Dinino (Tr. 282-283).

Dinino seeks to dismiss his threat to punch Shalkin in the nose after he had heard that Shalkin could not immediately repay his usurious loan because of illness by citing Shalkin's testimony that "no one ever punched his nose when he was unable to make timely payments" and "the language did not convey a threat to him" (Br. JD at 31). Even if these characterizations of Shalkin's testimony were accurate,* they afford Dinino no relief under the "objective standards" of *Natale*.

Similarly, Dinino seeks to deprecate the probative value of Hershkowitz' testimony that Dinino, knowing he was ill, grabbed him by the arm and angrily demanded his money by pointing out that Hershkowitz was not hurt and that after 10 or 15 minutes of angry words, Dinino finally agreed to wait for his money until Hershkowitz recovered (Br. JD at 32).** The fact that Hershkowitz was never injured by Dinino, however, is no defense to the charge that the latter used threats of force to collect extensions of credit.

Dinino contends that the evidence is insufficient to sustain a conviction under Count Two because "[t]he only evidence that threats were made to Levine was his disavowed grand jury testimony . . ." (Br. JD at 33).

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* When Shalkin was asked on cross-examination "isn't it a fact that many times in your life somebody would say, if you don't do this and so I'll punch you in the nose?" he responded "I guess it could happen" Tr. 134-135).

** Somewhat disingenuously, in light of his later reliance on Levine's professed lack of fear, Dinino argues that "[n]o matter if the jury believed Hershkowitz' trial testimony" that Dinino frightened him when he grabbed him, there could be no proper finding of extortion (Br. JD at 32). Of course, while a victim's fear is not an element of the offense, it is probative evidence of a defendant's intent. *United States* v. *Natale*, *supra*, 526 F.2d at 1168.

The contention is meritless. Levine's grand jury testimony, when taken together with the testimony of the other six Government witnesses, was itself a sufficient predicate for the jury's verdict on Count Two, *compare United States* v. *Nakaladski*, *supra*, 481 F.2d at 299. Since Levine testified and was available for cross-examination regarding that grand jury testimony, there can be no legitimately claimed violation of Dinino's rights under the confrontation clause of the Sixth Amendment. *California* v. *Green*, 399 U.S. 149, 155-164 (1970); *United States* v. *Rivera*, 513 F.2d 519, 527 (2d Cir. 1975), *cert. denied*, — U.S. — (1976).

Of course, given the circumstances here, that grand jury testimony was properly admissible as substantive evidence. Rule 801(d)(1), Federal Rules of Evidence; *United States* v. *Jordano*, 521 F.2d 695, 697 (2d Cir. 1975). Accordingly, it was entirely proper for the jury to have considered Levine's testimony in the grand jury that he was afraid of getting beaten up or having his leg broken when Dinino threatened to "send around a few guys to straighten [him] out" when he was unable to repay a gambling debt (Tr. 291-292).

Finally, Dinino asserts that with respect to his conviction on Count Seven, the evidence was insufficient because the "record is devoid . . . of any proof of willing participation" in the violence administered by his co-defendant, DeVito, to Philip Cassese when the latter refused to repay a loan made by Dinino. Dinino attempts to buttress his argument by contending in error that since no aiding and abetting or *Pinkerton* charge was given by the court, he cannot be held liable for DeVito's act.*

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* In the course of its charge to the jury, the court instructed as follows:

"I also charge you that it is not necessary that the defendant personally inflict the violence or the threat of vio-

[Footnote continued on following page]

Dinino, however, made the usurious loan to Cassese. He mentioned to Cassese that DeVito would make some of the weekly collections. There was ample proof that Dinino had used extortionate means on other debts to collect his loan and that DeVito was his partner. In these circumstances, DeVito's conduct is chargeable to Dinino. "'The general nature of the total transaction was such as to render this threat [by DeVito] a clear incident of the general operation and, thus, to be within the scope of the authority granted [by Dinino]. *United States* v. *Quintana, supra*, 454 F.2d at 877; *see United States* v. *Taglianetti*, 456 F.2d 1055, 1056 (1st Cir. 1972).

B. The evidence was sufficient to sustain DeVito's conviction of guilt on the substantive counts.

DeVito argues that "in the instances when Dinino was characterized as acting so as to enforce collection, there was no proof whatsoever that [he] knowingly participated in the action . . ." (Br. VD at 24). Contrary to his assertion, there was ample proof that DeVito aided and abetted Dinino's unlawful use of extortionate means to collect from Jackson, Shalkin and Levine.

DeVito himself used extortionate means to collect a loan from Cassese for Dinino. His argument that "it is not evidence of extortion where a lender acts coercively but the borrower would pay the money anyway"

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lence. The statutory language is 'knowingly participates in any way.' Thus, if you find that one defendant arranged to have the other defendant or still another person, such as Louis referred to, go to the debtors to collect money with the knowledge that they would use violence or threats of violence, and if such violence or threats or violence were actually used, then this would be knowing participation within the meaning of the statute." (Tr. 532)

(Br. VD at 18), is sheer makeweight in light of *Natale's* holding that "it is the conduct of the defendant, not the victim's individual state of mind, to which the thrust of the statute is directed." 526 F.2d at 1168. Moreover, the evidence was clear that DeVito was Dinino's partner in the extension of loans to Jackson, Shalkin, Levine and Cassese, and that he knew these loans to be usurious.* These circumstances fully support the jury's conclusion that DeVito used extortionate means to collect payments from Cassese and that he "knowingly participated in Dinino's use of extortionate means to collect extensions of credit from Jackson, Shalkin and Levine.

C. The evidence was sufficient to sustain appellants' convictions for conspiring to use extortionate means to collect extensions of credit.

It is well-settled that the conspiratorial agreement to commit an unlawful act need not be proved explicitly but can be inferred from the facts and circumstances of the case. *Iannelli* v. *United States*, 420 U.S. 770 (1975); *United States* v. *Turcotte*, 515 F.2d 145 (2d Cir. 1975). In the instant case, there was ample evidence that the conspirators entered into "a scheme or plan to extort" money from the Government's witness. *United States* v. *Rizzo*, 373 F. Supp. 204 (S.D.N.Y. 1973).

The appellant Dinino on occasion introduced DeVito as his "partner." During a five year period, Dinino and DeVito took turns collecting from each of the seven victim-witnesses who testified for the Government the repayments of loans which they both knew to be usurious.

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* DeVito made a usurious loan to Levine during the course of his collections for Dinino (Tr. 257-259). He also renegotiated the weekly payments which Ronson was making on his loan (Tr. 401-406).

When the debtors were unwilling or unable to pay, each of appellants on one or more occasions used extortionate means to attempt to collect the usurious extensions of credit. Against this factual background, there was ample justification for the jury to conclude that appellants conspired to violate Title 18, United States Code, Section 894, as charged in Count One.

POINT II

The prosecutor's summation was proper.

To rebut appellants' suggestion during trial that the Government had secured both grand jury and trial testimony against them by intimidation of Government witnesses (Tr. 298-300, 343), the prosecutor made the following argument to the jury in summation:

> There has been some mention that the government harassed some of the government witnesses in an effort to coerce their testimony or twist their arms. Well, let me put it this way.
>
> You have heard Philip Cassese's grand jury testimony. Did it sound to you in that grand jury testimony as if the government was harassing Philip Jackson [sic] or Philip Jackson [sic] was harassing the government?
>
> Not only that, it is kind of a strange contention for the defense to make that the government is harassing the government witnesses. We are not harassing them, they are harassing them. This is what the trial is about.
>
> It is about the acts of the defendants and the government witnesses. To say the government is harassing its own witnesses is like turning the world on its end. It just doesn't make sense. Besides which, you have again the grand jury

testimony of Philip Cassese read to you. Did it sound like the government was harassing.

Philip Cassese was protected. The grand jury foreman was there, everything was on the record for you to consider. Unfortunately there was no record made of what the defendant said and what Mr. DeVito said and did to the government witnesses in this case. All we have is some of the admissions they were willing to make in the grand jury and some of the testimony they were willing to make on the stand. (Tr. 456-457).

Following the closing arguments of all counsel, DeVito moved for a mistrial on the ground that the above comment by the prosecutor upon the credibility of the Government's witnesses was unsupported by the evidence. The trial court denied the application noting that the remarks were supported by direct and circumstantial evidence and thus were permissible as "fair comment." *

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* Counsel's objections and the court's response were as follows:

The Court: Please, make your motions.

Mr. Wallach: I am no moving for a mistrial because of the district attorney's summation, it is excessive. I would like to point out a few specifics. Firstly, the district attorney in his opening pilloried the defense——

The Court: Please, state your grounds.

Mr. Wallach: That's the grounds.

The Court: I do not have time for an oratory.

Mr. Wallach: He went into a supposed defense that was never interposed in this case and commented because his witnesses did not live up to his expectations that somehow or other this was attributable to the defense and that the defense minimized their witnesses. The implication is, of course, that the cross examination wasn't to the prosecutor's liking in this case and by the manner of the questions there was some relationship between the defense and the government's witness.

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The current renewal by Dinino and DeVito of their argument below is meritless and warrants no relief.

It is well settled that "within broad limits counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence." *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968); *United States* v. *Gerry*, 515 F.2d 130, 144 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). The prosecutor may properly discuss the credibility of witnesses so long as his remarks are supported by the evidence adduced at trial and are not couched in terms of personal opinion. *United States* v. *Murphy*, 374 F.2d 651, 655 (2d Cir.), *cert. denied*, 389 U.S. 836 (1967); *compare United States* v. *Burse*, Dkt. No. 75-1388 (2d Cir. March 8,

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Furthermore, your Honor, there is practically an express remark that somehow or other these witnesses were reluctant to testify favorably for the government because of something the defendants did.

There is absolutely no proof in this case that the defendants did anything. The fact that a witness for the prosecution doesn't live up to the prosecutor's hopes ——

The Court: Let's not have the oratory. We had one witness, Mr. Hershkowitz, who expressly stated he was afraid on the stand, and it is certainly — the essence of what the government was arguing was that there was a reason that these witnesses may not have or did not tell the full truth, because they were afraid, and there was circumstantial evidence of that or direct evidence of that on the stand. It was in my view fair comment.

What else do we have?

Mr. Wallach: It is thoroughly poor taste for the government prosecutor to tal-- [sic] to the jury and use a word that frankly talking is not English. I just don't understand what the purpose of using that word was, if not to appeal to sympathy of some jurors.

Mr. Abzug: The word is chutzpah in Yiddish.

The Court: I am not granting a mistrial because of that.

Mr. Wallach: I am putting that on the record. (Tr. 507-509).

1976), slip op. 2507. "A prosecuting attorney is not an automaton whose role on summation is limited to parroting facts already before the jury." *United States* v. *Wilner*, 523 F.2d 68, 74 (2d Cir. 1975).

Here, of course, the record was replete with direct and circumstantial evidence more than sufficient to permit the argument that the witnesses were reluctant to testify against the defendants because of fear. Hershkowitz testified that he presently was afraid of Dinino. An individual who was seated in the spectator's section of the courtroom was identified by one of the witnesses as a "collector" for Dinino (Tr. 308-309). At trial Levine and Cassese recanted testimony of threats by the appellants that they had given in the grand jury. Nonetheless, Levine admitted on direct examination that he was "uneasy" (Tr. 254). This testimony, and that of the other victim-witnesses, together with the discomfort evident in the witnesses' demeanor during their testimony,* gave ample support to the Government's argu-

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* Because of this atmosphere, the court warned all participants and spectators against intimidating the witnesses:

> I want to say something further and to everybody in the courtroom. I am not making any reference to any attorney. But these witnesses, one witness admitted fear. Mr. Hershkowitz stated flatly that he was afraid sitting here in court, and Mr. Cassese, his condition indicated to me some of the same feeling. I just think everybody ought to know, and again I am excluding the attorneys from any reference, and I am not making any accusations against anyone obviously, but the Court and the jury and the attorneys and the government, everybody, has a right to have this trial go forward without having witnesses intimidated.
>
> I think everybody should be warned that any attempt to reach and intimidate a witness is a crime. It is a crime of an obstruction of justice. Any indication that that has occurred will be followed up by the United States Attorney's office. It goes without saying that there is to be no

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ments that the pertinent grand jury testimony was uncoerced and that the recantation of the same at trial was attributable to a fear of appellants. In view of this record, the prosecutor's remarks were, indeed, fair comment.

Appellants also contend that the prosecutor's summation contained an improper assertion that he was personally aware of evidence, beyond that introduced at trial, which inculpated appellants and, further, that the prosecutor's remarks contained an improper comment on appellants' failure to testify (Br. JD at 39; Br. VD at 26-27). Neither of these specific objections was advanced below and both are thoroughly meritless. The failure below to object or to request a curative instruction precludes review of appellants' claims on this appeal and indicates trial counsels' difficulty in perceiving any prejudice. *United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied sub nom. United States* v. *Benigno*, — U.S. — (1976); *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

Moreover, a fair reading of the prosecutor's summation makes clear that his remark that all the jury had was "some" of the admissions that the witnesses were willing to make in the grand jury and at trial was not an improper suggestion that he was aware of other incriminating evidence not introduced at trial. The challenged remark was immediately preceded by the prosecutor's comment that "there was *no record made* of what the defendant said and what Mr. DeVito said

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attempt between now and tomorrow morning to, in any way, contact, communicate or each [sic] any of these witnesses. That injunction goes for anybody in this courtroom, wives, families, friends, or anybody else. Except legitimate attempts to interview these witnesses and that would be the attorneys only, and no one else is to communicate with them." (Tr. 270-71).

and did to the government witnesses in this case" (Tr. 456) (emphasis added). Viewed in this context, the intent and fair import of the challenged remark was to suggest to the jury that the witnesses' recantation and hesitancy were attributable to their fear of the appellants, and not Government coercion, and that it was unfortunate that the threats described by the witnesses in the grand jury and at trial were not "recorded" at the time they were made.

Moreover, even assuming *arguendo* that the challenged remark was in error, it was hardly flagrant or persistent in character but, rather, an isolated, one-sentence comment. As such, no relief is warranted. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 646-647 (1974); *compare United States* v. *Burse*, *supra*. Lastly, any arguable prejudice which did accrue was rendered harmless in light of the repeated admonitions to the jury by both court and counsel that the case was to be decided on the evidence alone and that the remarks of counsel were not evidence (Tr. 4-5, 10, 16, 451-452, 475, 488-489, 514-517, 520-522, 539.)*

Finally, DeVito contends frivolously (Br. VD at 26-27) that the prosecutor's assertion that there is "no controversy that each witness received an extension of credit from Mr. Dinino (Tr. 448, see Tr. 459) was an improper comment on appellants' failure to take the stand. The challenged comment merely reflected what the undisputed evidence showed and what defense coun-

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* Significantly, after the challenged summation and an entire day's deliberation, the jury acquitted both Dinino and DeVito on Count Six — clearly suggesting that they were hardly overwhelmed by any putative prejudice resulting from the prosecutor's remarks.

sel, throughout the trial, expressly or impliedly conceded.*

POINT III

The trial court's jury instructions were correct.

Dinino challenges the correctness of the court's exposition of the law governing the substantive offenses premised on 18 U.S.C. § 894. That portion of the charge provided:

> As to the first two elements, the necessity of proof of debts and collections or attempts at collections, no elaboration is necessary; however, I will give you certain instructions regarding the third element.
>
> This element is satisfied if you find that the defendant in connection with collection efforts knowingly participated in some way in the use of violence to harm the person of the debtor or the element is satisfied if you find that the defendant knowingly participated in express or implicit threats to use such violence.
>
> What is meant by an express or implicit threat? An express threat is one stated in words. An im-

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* For example, Dinino's counsel said in summation:

> There is no question in this that Dinino loaned money out, that he tried to get it back, that he tried to make a profit on it. There is no question about it (Tr. 477).

Similarly, it was implicit in the cross-examination and summation of DeVito's counsel that DeVito did not dispute the fact that he and Dinino had made the usurious loans about which the witnesses had testified (see, *e.g.*, Tr. 493, 498).

Appellant's only other challenge to the prosecutor's summation--that he improperly employed a foreign word, chutzpah—is frivolous. That word, which at least in New York City can accurately be said to have passed into common parlance, was in any event properly defined by the prosecutor to mean gall or arrogance (Tr. 502).

plicit treat is one which is intended to be understood from certain things that are said, although they are not direct threats, or is intended to be understood from gestures or actions.

You have heard the testimony of certain of the debtor witnesses denying that they were threatened. It is for you to assess the credibility of this testimony as well as all the other testimony. You are to consider among other things whether this testimony is influenced by factors such as fear of the defendants.

I am not suggesting that this is the case, I am simply saying that this is one of the questions for you to consider.

I also instruct you that the testimony of a witness that he was not threatened, even if believed by you, is not conclusive or binding upon you. You will consider this testimony, but you will also consider all the other testimony about the defendants' statements and conduct and about the surrounding circumstances, and you will make your own determination as to whether the government has proved that express or implicit threats were made or participated in by a defendant.

Normally we understand a threat to be something which causes fear. You have heard the testimony of certain of the debtor witnesses denying that they were made to be afraid. Again, it is for you to assess the credibility of this testimony.

But, in any event, it is not necessary for the government to prove that fear was actually induced in the debtor. It is the conduct of the defendant rather than the debtor's individual state of mind to which the statute is directed.

What the government must show in order to convict for an unlawful threat here is that the

defendant intended to instill fear in the debtor by words or actions reasonably calculated to do so (Tr. 529-530).

* * *

On the question of credibility of witnesses, I mentioned to you that you could consider—let me just say what I meant to mention and I hope I mentioned and I will mention it now, on the question of bias or hostility or friendly feeling, obviously, you can and should consider any indications that you see of any bias in favor of the government or in favor of the defendants.

If you see any indication of any hostility towards the government or hostility to the defendants, that should be weighed.

You have observed the witnesses. In other words, it works both ways. If I did not indicate that in my earlier charge, then that was a mistake" (Tr. 560).

Virtually acknowledging that the foregoing is a correct statement of the law, Dinino contends that the court's instruction permitting the jury to determine whether the witnesses' testimony was influenced by fear of Dinino and DeVito constituted error in this case because it was surplusage and directed the jury's attention to "matters outside the evidence" (Br. JD at 41). In view of the recantation by two Government witnesses of their grand jury testimony, wherein they stated that they had been threatened by Dinino and DeVito, the trial testimony of several witnesses that they had been the recipients of explicit threats from Dinino, DeVito or Louis and were afraid of appellants or "uneasy," and of the demeanor of all the witnesses at trial, the court had more than ample grounds for instructing the jury on the question of whether the trial testimony of one or more of the Government witnesses had been influenced by fear of the

appellants. Moreover, the court took care to charge the jury that its instructions should not be construed as a suggestion that fear in fact existed and, further, that in assessing credibility the jury should consider as well any bias in favor of the Government on the part of any witness.

Dinino also contends that the court's instructions that "the testimony of a witness that he was not threatened, even if believed by you, is not conclusive or binding" improperly withdrew a material element of the offense from the jury's consideration. The contention is frivolous.

The trial court did no more than restate this Court's teaching that "it is the threat of harm which is prohibited by 18 U.S.C. § 894, and actual fear is not an element of the offense." *United States* v. *Natale*, *supra*, 526 F.2d at 1168. "[S]o long as the defendants intended to take actions which reasonably would induce fear in an ordinary person" (*ibid.*) (footnote omitted), proof of actual fear in the intended victim is not required. Accordingly the charge was free of any error.*

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* Not only was the trial court's charge a wholly correct statement of the law, but it served fairly and accurately to crystalize the precise questions the jury was called upon to decide, given the facts of this case:

> "What the government must show in order to convict for an unlawful threat here is that the defendant intended to instill fear in the debtor by words or actions reasonably calculated to do so.
>
> The defendants contend that the alleged threats were merely the normal earthy language of the kind of people involved in these transactions and in this environment, and that the government has not proved that the statements in quesion were intended to arouse fear or were reasonably calculated to arouse fear.
>
> It is for you to determine whether the language used falls in the category of a threat. In this connection you will, of course, consider the circumstances of the utterances

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POINT IV

The trial court properly admitted excerpts from the grand jury testimony of two Government witnesses as substantive evidence. The trial jury's rejection of defendants' claim that that grand jury testimony was the product of undue coercion by the prosecution was wholly proper.

Dinino contends that the admission of portions of the grand jury testimony of two trial witnesses for the Government, Ronald Levine and Philip Cassese, requires reversal because the prosecutor obtained that grand jury testimony by means of coercion and in violation of his duty to present to the grand jury "evidence which he knows will tend to negate guilt" (Br. JD at 45).* The contention, which is little more than a restatement of the argument Dinino unsuccessfully urged on the trial jury, is thoroughly false and warrants summary rejection by this Court.

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in determining whether they were intended to have a threatening meaning or were merely intended to have a jocular or joking or innocent meaning.

You will also consider the testimony of certain of the debtor witnesses to the effect that they repeatedly over long periods of time sought out the financial assistance of one or both of the defendants, accepted the arrangements and had friendly relationships with the defendants. You will weigh this testimony like all the testimony as to its credibility. You will consider it on the question of whether the government has proved its case of violence or threats of violence.

But I charge you that if you find that there was violence or were threats of violence, it is no defense that the debtors were generally friendly with the defendants or submitted to or tolerated these conditions." (Tr. 531-532).

* This Court may properly decline to review this alleged ground of error since it was never raised in any form in the District Court. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

Dinino concedes that Rule 801(d)(1) of the Federal Rules of Evidence, and prior decisions of this Court, *e.g. United States* v. *De Sisto*, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964), permit the use of a witness' prior inconsistent, sworn testimony as affirmative evidence at trial. The use of such testimony as affirmative evidence is permissible regardless of whether the witness' denials at trial are the product of fear, desire to help the defense, or an honest lapse of memory. *United States* v. *Klein*, 488 F.2d 481, 483 (2d Cir. 1973), *cert. denied*, 419 U.S. 1091 (1974), and cases cited therein.

It is not surprising that the vast majority of cases in which this Court has been called upon to consider an offer of such proof by the Government have involved defendants who were charged with crimes involving either violence or threats of violence, *e.g.*, *United States* v. *Jordan*, 521 F.2d 695 (2d Cir. 1975) (bank robbery); *United States* v. *Rivera*, 513 F.2d 519 (2d Cir. 1975), *cert. denied*, — U.S. — (1976) (murder of a federal narcotics agent, and assault of a federal narcotics agent with a deadly weapon; *United States* v. *Klein*, *supra*, (bank robbery and assault upon employees); *United States* v. *De Sisto*, *supra* (hijacking). See *United States* v. *Gerry*, 515 F.2d 130, 141 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

In the instant case, both the testimony of the witnesses, and the evidence of the grand jury testimony adduced at trial were replete with references to threats made by Dinino and DeVito, and to the fear engendered in the victims by these threats. It is thus scarcely surprising that the District Court was called upon here, once again, to deal with witnesses' disavowals, in the presence of the defendants, of testimony given in the secrecy of Grand Jury proceedings.

Dinino's contention that the trial testimony of Levine and Cassese—to the effect that the Government attorney

who questioned them in the grand jury used undue coercion—stood "uncontradicted" is simply in error (Br. JD at 46). That testimony was squarely contradicted by the evidence of the witnesses' previous secret grand jury testimony "in a setting calculated to impress the witness with the gravity of the responsibility." *United States* v. *De Sisto*, *supra*, 329 F.2d at 9[illegible]. In any event, the resolution of the inconsistencies between the trial testimony, and the prior, recanted grand jury testimony was, of course, firmly a matter of credibility, within the sole province of the jury to determine.

Dinino's claim, finally, is nothing more than an attack on the trial jury's resolution of this inconsistency, given its opportunity to hear the testimony and observe the demeanor of all seven Government witnesses, and their fear, or lack of fear. That resolution of credibility, which [illegible]ce resulted in a factual finding in favor of the g[illegible] jury testimony over the recantation of that testimony at trial, clearly established that the jury disbelieved the trial assertions of Levine and Cassese that their grand jury testimony was both untrue and coerced. *See United States* v. *Terrell*, 390 F. Supp. 371, 373-374 & n.2 (S.D.N.Y. 1975) (Weinfeld, *J.*). Given the nature and sufficiency of the Government's evidence generally, and the witnesses' demeanor, which even the trial court commented on (Tr. 270-71), the jury's verdicts of guilt should not be disturbed by this Court.

Dinino's further complaint that reversal is required because the Government did not affirmatively rebut the allegations by two witnesses of Government pressure and misrepresentation is frivolous. "The truth, as the government understood it, was contained in [the witnesses'] grand jury testimony," *United States* v. *Jordano*, *supra*, 521 F.2d at 697, and while the Government could properly have called the attorney who had conducted the grand jury proceedings, it was under no obligation to

do so.* Indeed, the prosecuting attorney who presented the witnesses to the grand jury was equally available to defense counsel and could properly have been called by them in an effort to bolster their claim of coercion. Instead, defense counsel chose not to do so and to rest on the current record. Having undertaken this trial strategy, which was unsuccessful with the jury, counsel cannot now be heard to raise a claim of error before this Court. *Compare United States* v. *Estremera*, Dkt. No. 75-1261 (2d Cir. February 2, 1976), slip op. 1695, 1705-06.

POINT V

Title 18, United States Code, Section 894 is not void for vagueness as applied to the facts of this case.

The evidence at trial established that Dinino and DeVito collected extensions of credit by express and implicit threats of force and violence. Since "the statute [18 U.S.C. § 894] punishes only the *knowing* use of extortionate means, and thus prohibits the making of an 'implicit' threat only if, at a minimum, the actor knows that his words or act ought reasonably to be taken as a threat," *United States* v. *DeStafano*, 429 F.2d 344, 347 (2d Cir. 1970), *cert. denied*, 402 U.S. 972 (1971), it may not successfully be attacked on vagueness or overbreadth grounds. *Id.* at 346-347; *United States* v. *Curcio*, 310 F. Supp. at 351, 356-357 (Timbers, *J.*).

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* In the Government's view, argued by the prosecutor in summation, the claims of undue Government coercion by witnesses Levine and Cassese was a product of their fear of Dinino and DeVito, against whom they were compelled to testify. The claim, made for the first time on this appeal, that the prosecutor withheld from the grand jury evidence favorable to appellants is unsupported by anything in the record and false.

See *United States* v. *Perez*, 426 F.2d 1073, 1078-1080 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States* v. *Palmiotti*, 254 F.2d 491, 495-496 (2d Cir. 1958).

In any event, given the trial court's wholly correct statement of the law to the jury (see Point III, *supra*), there was simply no possibility here that the jury's verdicts were predicated on a finding that appellants engaged in "'*entirely innocent*' acts or communications made threatening only by the belief of the victim that, because of the character or reputation of the lender, he is being threatened" (footnote omitted) (emphasis in original). *United States* v. *De Stefano*, *supra*, 429 F.2d at 346. Accordingly, the statute is not unconstitutionally vague as applied to appellants' conduct and their claims to the contrary warrant no relief.

CONCLUSION

The judgments of conviction should be affirmed.

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